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Comics, Copyright and Academic Publishing

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COMMENTARY

Comics, Copyright and Academic Publishing

Ronan Deazley*

This article considers the extent to which UK-based academics can rely upon the copyright regime to reproduce extracts and excerpts from published comics and graphic novels *without* having to ask the copyright owner of those works for permission. In doing so, it invites readers to engage with a broader debate about the nature, demands and process of academic publishing.

Keywords: copyright; academic publishing; comics scholarship

1. Introduction

The Comics Grid: Journal of Comics Scholarship is one of a small but growing cohort of scholarly publications dedicated to the study of comics that has emerged in recent years. As an academic and a long-standing comics fan, *The Comics Grid* appeals to me for a number of reasons: first, it is committed to the principles of open access and open peer review; second, it genuinely embraces the potential that digital publication offers to academics in its commitment to rapid scholarly publication; and third, to my knowledge, it is the only journal in this domain that is actively trying to improve the study of comics by educating its authors and readers – in an informed and reasonable way – about copyright and the place of copyright in comics scholarship.

Consider, for example, these two panels taken from Fleetway's short-lived serial *Crisis* (1988–91) [Fig. 1]. They are taken from *Her Parents*, a short story that appeared in Issue 31, written by Mark Millar and drawn by John McCrea. In terms of copyright, do I need to clear any rights to reproduce them here?, and if so, who should I ask? Is this a work of joint authorship? Do I need to ask *both* Millar and McCrea?, or did they assign or license their rights to Fleetway at the time? When *Her Parents* was first published, Fleetway was owned by Robert Maxwell; however, in 1991 Maxwell sold Fleetway to Egmont UK (part of the Danish-based Egmont Media Corporation). If Egmont UK now owns the copyright in this work, can I reproduce it without their express permission? Or what if I have the permission of Millar and McCrea? Does that matter?

This article is intended to supplement the work that *The Comics Grid* has already begun in challenging some cherished myths about the use of copyright material in the context of comics (and other academic) scholarship.



Fig. 1: Millar and McCrea, *Crisis* #31 (1989) 17/5–6.

It considers the extent to which UK-based academics can rely upon the copyright regime – the *Copyright Designs and Patents Act* 1988 (hereafter: the CDPA) – to reproduce extracts and excerpts from published comics and graphic novels *without* having to ask the copyright owner of those works for permission. In doing so, it hopes to encourage greater openness in discourse and debate about a medium

* Professor of Copyright Law, University of Glasgow, United Kingdom
ronan.deazley@glasgow.ac.uk

that occupies an increasingly significant place within our cultural and political lives. Moreover, within this article, we might also begin to sow the seeds of a broader, necessary debate about the nature, demands and process of academic publishing.

2. Comics scholarship and clearing rights

Academics who research and write about the visual world often complain about the way copyright law can hinder their scholarly endeavours, and with good reason. Writing about visual work without reproducing that work is an impoverished exercise, for both writer and reader. But reproducing visual work can trigger concerns on the part of the conscientious author or – more often – demands on the part of the publisher about the need to secure copyright permission. In this respect, comics scholarship is no different from any other field of visual or cultural studies. Clearing rights for publication can be a frustrating and time-consuming business, and academic publishers often manage the business of copyright clearance by making their contributors responsible for securing permissions. *European Comic Art* is typical: in its information for contributors, it sets out that '[u]pon acceptance [for publication], authors are required to submit copyright agreements and all necessary permission letters for reprinting or modifying copyrighted materials, both textual and graphic. The author is fully responsible for obtaining all permissions and clearing any associated fees.'¹

Not all publishers, however, adhere to such a black and white position. The *Journal of Graphic Novels and Comics* is published by Taylor & Francis. In the *Authors Services* section of its website, the publisher acknowledges that reproducing short extracts of text and other associated material 'for the purposes of criticism may be possible without formal permission'.²

To better understand *when* permission is required, the publisher directs authors to the Publishers' Association *Permissions Guidelines*. For readers who are unfamiliar with this organisation, the Publishers' Association (hereafter: the PA) is the principal UK-based trade organisation representing book, journal, audio and electronic publishers.³ It plays an active role in helping its members understand and navigate copyright law and policy debates. This includes providing members with access to a copyright infringement portal (a web-based tool for serving take down notices to ISPs hosting content that infringes copyright),⁴ as well as the production of guidelines for publishers on a range of related topics. One such publication is the *PA Permissions Guidelines* (hereafter: the *Guidelines*) referred to on the Taylor & Francis website. The *Guidelines* are intended to 'assist UK publishers who: a) may be approached for permission to reproduce copyright material published by them, or, b) may themselves need permission to reproduce material published by others' (PA 2008: 1). We will consider the substance of the PA's *Guidelines* later in this article.

To better understand *what rights* need to be cleared, Taylor & Francis direct authors to the publisher's own FAQs about using third-party copyright material in an academic

article. There are 22 FAQs to which the publisher provides boilerplate responses. Of these, 13 expressly relate to the reproduction of visual material. To the question, '[d]o I need permission' to reproduce the work?, the answer is typically: 'Yes'. Consider, for example, the following: '**Do I need permission if I use an image from the Internet?** / Yes, you will need to find out the status of the image and find out who owns the copyright (this may be the photographer, artist, agency, museum, or library). You will then need to get permission from the copyright holder to reproduce the image in a journal article'.⁵ Indeed, only two of the 13 FAQs relating to visual material acknowledge the potential to reproduce work without permission for the purpose of criticism or review; these relate to, respectively, the use of 'screenshots or grabs of film or video'⁶ and the use of 'very old paintings'.⁷

What is not clear from this FAQs document is whether the publisher is purporting to accurately represent the law in this area. If so – as we shall see – the FAQs document is clearly deficient. If, however, the publisher is simply using the FAQs document to set out the parameters of its own editorial policy on the reproduction of copyright-protected third-party material, then so be it: the publisher is perfectly entitled to adopt such editorial guidelines as it sees fit. I would suggest, though, that in cleaving to an editorial policy that fails to take full advantage of the scope which the copyright regime allows for the lawful reproduction of copyright-protected material without need for permission, the publishers are missing an opportunity to enable its academic contributors to augment and enrich comics scholarship as a discipline.

In this respect *The Comics Grid* is more ambitious and forward thinking: it actively promotes the lawful use of copyright-protected content for the purposes of academic scholarship. The journal's copyright policy sets out that copyright material is reproduced on the basis of 'educational fair use', with readers and contributors directed to Columbia University Libraries' *Fair Use Checklist* for further information. This is a checklist that has been developed to help academics and other scholars make a reasonable and balanced determination about whether their use of copyright-protected work is permissible under s.107 of the US *Copyright Act* 1976: the *fair use* provision.

Obviously, the journal locates its copyright advice within the context of US copyright law. But, as a Glasgow-based academic, with an interest in both the history and the current state of the copyright regime, my particular focus within this article concerns the extent to which UK-based academics – or indeed anyone interested in writing about comics – can rely upon the UK copyright regime to reproduce extracts and excerpts from published comics and graphic novels *without* having to ask the copyright owner of those works for permission.

To address that issue, we must consider three key questions. What constitutes *a work* protected by copyright within the context of comics publishing? What does it mean to speak of *insubstantial copying* from a copyright-protected comic? And, what scope do existing – and

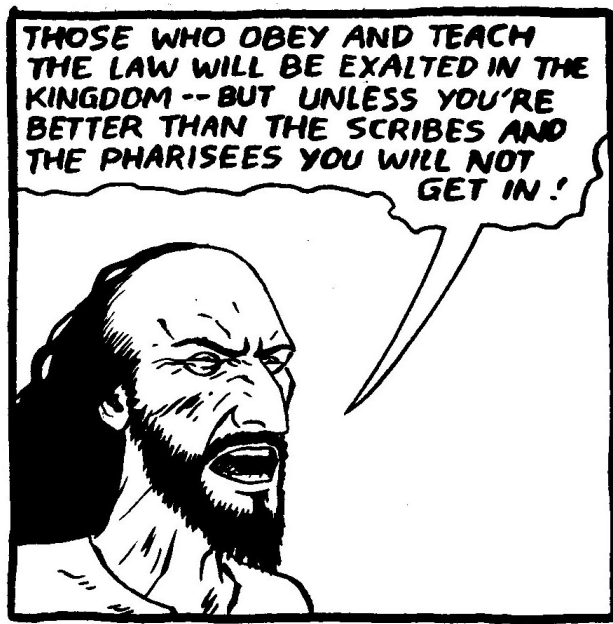


Fig. 2: Brown, *Yummy Fur* #21 (1990) 18/6.

forthcoming – exceptions to copyright afford the academic in this regard? Where appropriate, we will also reflect upon how the PA Guidelines address these issues.

2.1. What is 'A Work'?

The CDPA 1988 provides a detailed and exhaustive list of eight types of work that qualify for copyright protection within the UK (CDPA: s.1). So, before we can properly appreciate what latitude there exists within the copyright regime for the reproduction of copyright-protected work without permission, one must understand what constitutes 'a work'.⁸ This is axiomatic: one can only sensibly and reasonably interrogate notions of substantial copying and fair dealing – about which more below – in relation to an identified 'work'. To be sure, for most copyright-protected content what constitutes a work will not present many conceptual challenges. The work is: the novel, the poem, the playtext, the score, the painting, the photograph, and so on. Like the proverbial elephant, we tend to know the work when we see it. With the medium of comics, however, things are not always so straightforward.

One characteristic of comics is that individual stories are often presented to the reader, played out across a number of issues: similar to the serialisation of literary works – often published with accompanying illustrations – by Victorian novelists such as Charles Dickens and Wilkie Collins. If Dickens's work was still in copyright today would we regard, say, *Great Expectations* as 'a work', even though it was first published in serial form? Almost certainly yes; few would seek to argue otherwise. Should we read (certain) comics in a similar vein: that is, works first published in serial form?

Consider Dave Sim's *Cerebus the Aardvark*. Published over a period of nearly 30 years (1977–2004), this ground-breaking work is best understood as a series of ten 'novels' collected into 16 'books'. The third of these 'novels', *Church & State*, was first published across 59 issues

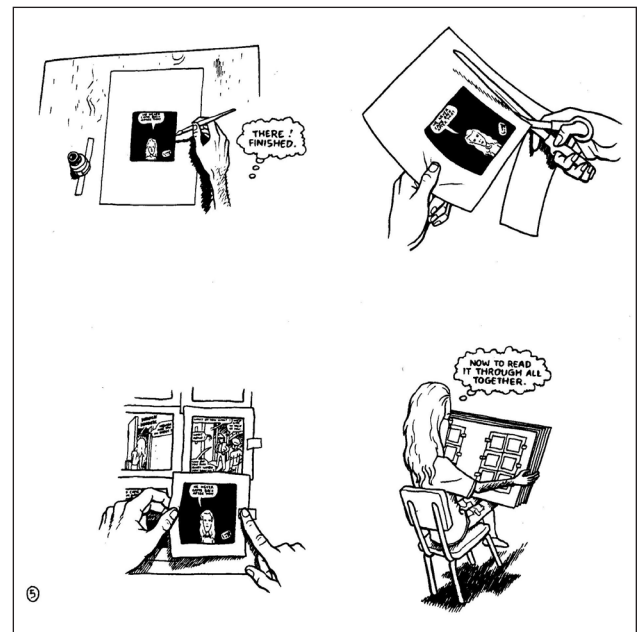


Fig. 3: Brown, *Yummy Fur* #20 (1990) 5/1–4.

between 1983–88 (Issues 52–111) before being collected and published in book form as two volumes (*Church & State Volume I*, and *Church & State Volume II*) in 1987 and 1988 respectively. So: for copyright purposes, what is the 'work'? Or what about Chester Brown's adaptation of the Gospel of Matthew [see Fig. 2]? Brown began his adaptation in *Yummy Fur*, Issue 15 (March 1989). It continued in the remaining issues of *Yummy Fur* (Issues 16–32), and then in Brown's next project: *Underwater* (11 issues, 1994–97). The most recent instalment ('Chapter 20, verses 1–29') appeared in *Underwater* Issue 11 in October 1997 and, at the time of writing, Brown has yet to complete his work on the remaining eight chapters. But again: what, here, is the 'work', and does our understanding of 'the work' shift depending on what we know about the author's own creative process?

Brown, in this respect, provides an intriguing case study. In *Yummy Fur* Issue 20 he offers his readers an insight into the way he constructs his comics (at least, circa 1990) [see Fig. 3]. Brown typically works with page layouts of between five and seven panels, which panels are rarely uniform in size or shape. But, whereas most comic artists sketch or draft a page of comic art as a single page, Brown draws each panel individually, on a separate sheet of paper (often 'cheap typewriting paper' (Matt 1991: 67/19)), and then assembles each 'page' of the comic by arranging these individual panels on a larger sheet. Given this, should we regard each of Brown's panels as a 'work'?

One final example: Chris Ware's *Building Stories*, an exquisite artefact, beautifully rendered by the artist, and luxuriously produced by the publisher (Ware 2012). Its unconventional format challenges preconceptions that anyone – whether a long-standing comics fan or not – might have about the form and format of the comic. It consists of 14 different types of printed work (individual books, newspapers and broadsheets, flip books, a poster,

accordion-style fold-outs, and so on) which present the reader with a complex, multi-layered story centred around an unnamed female protagonist, but one that eschews narrative linearity. Produced over a period of ten years, these 'works' are collectively presented to the reader in an illustrated box: a format inspired by Marcel Duchamp's *Box in a Valise* (1935–41). So, what is 'the work' that is the subject of copyright protection: the box and its contents? Should we understand each of the 14 vignettes as separate works in themselves?, rather than parts of a richer, more ambitious and intriguing narrative project? Is the box 'a work'?

My point here is not to make things more difficult for those writing about comics who are grappling with copyright clearance issues, or to further obfuscate an already problematic legal landscape; quite the reverse. But one cannot escape the fact that the very nature of comics problematise what are otherwise often simple, conceptual distinctions in other fields of literary and artistic publishing. And as we shall see, these definitions matter; for example, the courts routinely identify the *amount of the work that has been copied* as a significant factor in determining whether the unauthorised use of the work constitutes 'fair dealing'. To return to *Cerebus*: reproducing one page from *Church & State* – a work that runs to 1220 pages in its entirety – is a very different prospect to the reproduction of a single page from one of the 59 individual issues that progress the *Church & State* storyline [see Fig. 4]. Quantitatively speaking, it is the difference between reproducing 5% of an individual comic and reproducing 0.08% of the *Church & State* novel.

But we will return to the concept of 'fair dealing' in due course. For now, it is enough to reiterate that identifying what constitutes 'a work' when dealing with comics is often conceptually problematic, which in turn blurs the boundaries of permissible and impermissible use for both copyright owner and user. Let us assume, however, that one can confidently identify the 'work' with which one is dealing; that being the case, there are three obvious strategies that an academic or researcher might rely upon when reproducing material from that work without the need for permission from the copyright owner. They concern: (i) insubstantial copying; (ii) fair dealing for the purpose of non-commercial research; and, (iii) fair dealing for the purpose of criticism and review. We deal with each in turn.

2.2. Insubstantial copying

Section 16 of the CDPA sets out the various 'acts restricted by copyright': that is, the different types of protected activity (copying, distributing, communicating online, and so on) that require permission from the copyright owner. The legislation provides, however, that the protection granted to copyright owners only extends 'to the work as a whole or any substantial part of it' (CDPA: s.16(3)(a)). Put another way: it is lawful to make use of another's copyright work, so long as you are not copying any more than a substantial part of the work. But where does one draw the line between substantial and insubstantial copying?

It is often said that the issue of substantiality depends upon the *quality* of what has been taken rather than the quantity (*Sillitoe v McGraw* 1983: 545), and courts of late have demonstrated a marked willingness to find infringement so long as the part used is not 'insignificant' or *de minimis* (per Lord Bingham, *Designers Guild v Russell Williams* 2001: 11). This would seem to militate against the likelihood of successfully relying upon an argument of insubstantial copying when reproducing any material – even a single panel – from a comic without permission. Without wishing to indulge in cliché, if there is any truth in the conceit that a picture paints a thousand words, the argument that reproducing even a single panel from a comic might be regarded as *qualitatively substantial copying* is likely to enjoy some traction. However, David Vaver has recently called for copyright to be guided by a principle of *harmless copying*; that is: copying that causes no harm should not be considered wrongful (Vaver 2012). In that spirit, I would like to develop an argument that makes a claim for a reinvigoration of the concept of *insubstantial copying* within the context of comics publishing.

To understand what lawful insubstantial copying might mean in relation to a comic, one must understand *the comic as sequential art*, a term famously coined by Will Eisner in 1985. Scott McCloud develops the notion further in the landmark *Understanding Comics*. Of particular interest is what McCloud has to say about 'closure' (the experience of 'observing the parts but perceiving the whole'), a foundational concept in the psychology of narrative. McCloud argues that comics rely upon 'closure' as an agent of 'change, time and motion': a phenomenon that occurs in *the space between* comic panels, often referred to as 'the gutter' (McCloud 1993: 66–67). He writes as follows: 'Comics panels fracture both time and space, offering a jagged, staccato rhythm of unconnected moments. But closure allows us to connect these moments and mentally construct a continuous, unified reality'. And whereas closure in the context of film and television is 'continuous, largely involuntary and virtually imperceptible' (McCloud 1993: 68), with comics closure depends upon the active participation of the reader.

Consider the single panel from *Understanding Comics* [Fig. 5]. If you are reading this article online, then, with this panel, you are looking at a digital copy of a digital copy of a printed copy of an image that incorporates a drawing of an iconic twentieth century painting. By itself, the image is simply an image bearing as much significance (or not) as the observer cares to invest in the same. However, when presented as part of a sequence, as McCloud puts it, 'the image is transformed into something more: the art of comics' (McCloud 1993: 5). It is the *sequential nature* of the comic form that is imperative here and, I would suggest, when applying well-established principles of copyright law to the comic as 'a work', the law should be sensitive to the unique vocabulary and grammar of comics as an art form. That is, if the phenomenon of closure is as integral to the very nature of the comic as McCloud suggests, then – without a sequence, without the gutter – the reproduction of a single panel

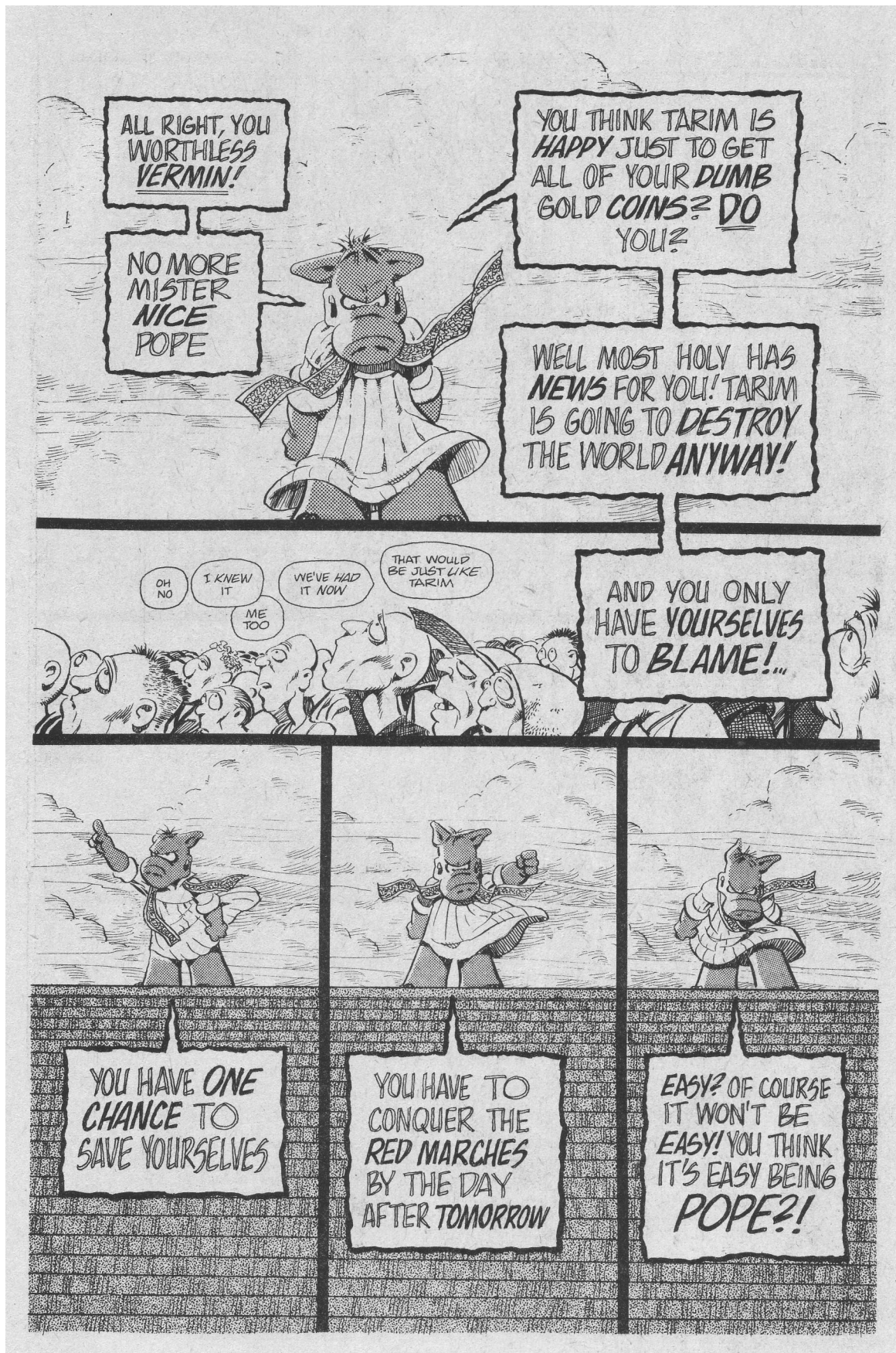


Fig. 4: Sim, *Church & State Vol. I* (1989) 421.

from a comic should not typically be regarded as an instance of substantial copying: at least not from a *qualitative* perspective.

There is, of course, something counterintuitive about this analysis: one presumes someone writing about a comic chooses to reproduce a particular panel from the



Fig. 5: McCloud, *Understanding Comics* (1993) 25/6.

comic *precisely because it is significant*. And, on its face, this logic appears to be at odds with my argument that a single panel from a comic should not be understood to be qualitatively substantial or significant. And yet, adhering to that argument does not mean that the panel cannot or should not be regarded as significant within the confines of a scholarly article. In this respect, it is essential that we hold in mind – and clearly differentiate between – the two different contexts within which the image is reproduced: the comic as a copyright-protected ‘work’, and the scholarly article. There is no contradiction in the idea that the same image might be *qualitatively insignificant* in the former context, while simultaneously being *intellectually or illustratively significant* in the latter.

Also, I make no claim here about whether a single panel from a comic may or may not be a *quantitatively* significant part of the comic within which it appears. That will always depend upon the individual circumstances under consideration. Quantitatively, for example, it is easy to see how reproducing a single panel from a three or four panel daily newspaper comic strip would amount to substantial copying. But consider again the panel from *Understanding Comics*: it is one of six panels from a page in a book of 215 pages. It represents approximately 0.1% of the work that is *Understanding Comics*. Does that amount to substantial copying – from a quantitative perspective – for the purposes of the CDPA? Perhaps, perhaps not; but in any event, I do not want to labour the argument concerning insubstantial copying: it is not the strongest of the three strategies that I discuss in this article. I simply want to make the claim that a strategy for lawfully reproducing copyright-protected material from a comic based on the concept of insubstantial copying is sustainable, intellectually as well as from the perspective of well-established copyright principles.

With that in mind, let us consider our remaining two strategies, based on specific exceptions set out within the

current copyright regime: fair dealing for the purpose of non-commercial research, and fair dealing for the purpose of criticism and review. As the concept of fair dealing is common to both, we address it in brief, before turning to the relevance and scope of each exception.

2.3. Exceptions to copyright

2.3.1. Fair dealing...

What constitutes fair dealing with a work? As the concept is not defined within the CDPA, let us begin with the advice set out in the PA’s *Guidelines*: ‘What is “fair dealing” is a subjective test which may very depending on the facts of each case, and quite possibly on the motives of the person doing the copying. Other factors may include whether the original work is already published, how extensive – and important – the extracts taken from the same work are in relation to the whole work, and in some cases how frequent. [And] any commercial motivation is directly relevant, particularly if it might conflict with [the] normal exploitation of the work by the publisher.’ (PA 2008: 2). On the first point, I would offer a correction: fair dealing is *not* determined *subjectively* (that is, from the perspective of the claimant alleging copyright infringement). Time and again, the courts have stressed that the concept of fair dealing is to be tested *objectively*. Lord Justice Aldous put it very succinctly: ‘the court must judge the fairness [of the use] by the *objective standard* of whether a fair minded and honest person would have dealt with the copyright work [in the same manner as the defendant]’ (emphasis added) (*Hyde Park v Yelland* 2000: 38).

Otherwise, this is, in many respects, a reasonable, albeit brief summation of current copyright doctrine on the concept of fair dealing. Recent court decisions have indicated a number of factors worth bearing in mind that may be of relevance, many of which are alluded to in the PA *Guidelines*. For example, in 2001 Lord Phillips identified three considerations to be of particular importance (the so-called ‘Laddie factors’): (i) commercial competition with the claimant; (ii) prior publication; (iii) the amount and importance of the work taken (*Ashdown v Telegraph Group* 2001: 66–77).⁹ In 2005 Justice Mann stressed that the motives of the user are also important, as is the actual purpose of the new work that is being produced; in addition, he indicated that, depending on the circumstances, reproducing an original work *in its entirety* could be regarded as fair (*Fraser-Woodward v BBC* 2005: 55–70). Ultimately, however, such dicta can only ever be indicative; it is simply not possible to provide clear and precise guidelines as to what will or will not be considered fair in any given case. As Lord Denning famously observed: ‘After all is said and done it must be a matter of impression’ (*Hubbard v Vosper* 1972: 84).

2.3.2. ... For the purpose of non-commercial research (CDPA s.29)

Section 29(1) of the CDPA provides that fair dealing with a work for the purpose of non-commercial research does not infringe any copyright in the work. Before considering the internal logic and scope of s.29, it is worth

considering what is meant by ‘research’? In addressing this question, it is important to appreciate that the current exception was amended in 2003 to ensure compliance with A.5(3)(a) of the European *Information Society Directive* 2001 (The Patent Office 2001: 9). Article 5 of the *Information Society Directive* sets out a list of mandatory and optional exceptions to copyright that Member States can incorporate within their national copyright regimes, and 5(3)(a) in particular establishes that Member States are entitled to provide for an exception ‘for the sole purpose of illustration for teaching or *scientific research* ... to the extent justified by the non-commercial purpose to be achieved’ (emphasis added). And so: what bearing does the reference to ‘scientific research’ in A.5(3)(a) have on the meaning of ‘research’ within s.29? Influential opinions differ.

Laddie, Prescott and Vitoria on Copyright suggests that, as the exceptions set out in the Directive are to be strictly interpreted (see: *Infopaq v DDF* 2009: 56), ‘there would not appear to be any justification for interpreting the exception broadly to encompass matters which involve no enquiry or investigation which is scientific in nature’ (Vitoria et al 2011: 21.33); this reading of the legislation was subsequently endorsed by Justice Arnold (*Forensic Telecommunications Service* 2011: 109), albeit as *obiter dictum*.¹⁰ The authors of *Laddie* continue that, as such, research conducted in the arts and humanities ‘could not by any stretch of the imagination be called scientific’ (Vitoria et al 2011: 21.33, n6). Compare, however, the line taken in *Copinger on Copyright*: ‘although the Directive refers to scientific research, it is reasonably clear that this includes the humanities’ (Garrett et al 2010: 9–30). If the interpretation advanced in *Laddie* is correct, then s.29 would have almost no relevance for researchers and academics working outside explicitly scientific domains. That would be extremely unfortunate. From my perspective, if, as and when a court does hand down an express ruling on the meaning and scope of ‘research’ within the context of s.29(1), it is to be hoped that an interpretation is adopted that is as wide and as purposive as possible, albeit one that is consistent with the requirements of A.5(3)(a).

Turning to the arrangement of the exception, it will be useful to set out the relevant parts of s.29 at length: ‘(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement. / (1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise. / (1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work ... (3) Copying by a person other than the researcher or student himself is not fair dealing if - ... (b) ... the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.’

Notice two things: first, the exception provides for two types of permissible copying in two separate sub-clauses: copying for non-commercial research (s.29(1)), and copying for private study (s.29(1C)); second, the lawfulness of fair dealing for non-commercial research turns upon the copying being ‘accompanied by a sufficient acknowledgement’, whereas copying for private study does not. Intuitively, this suggests two contrasting types of activity: one that has a purely internal or personal dynamic,¹¹ and one that anticipates external and public engagement.¹²

In relation to the latter, consider RCUK’s *Policy on Open Access*, a policy developed to ensure that publicly funded research is as freely accessible as possible: ‘the Research Councils take very seriously their responsibilities in making outputs from this research publicly available – not just to other researchers, but also to potential users in business, charitable and public sectors, and to the general public’ (RCUK 2013). Or what about the recent observations in the 2012 Finch Report on expanding access to published research findings: ‘[T]here is an increasing tendency across Government and other bodies, both in the UK and elsewhere, to regard information generated by researchers as a public good; and to promote the reduction, if not the complete removal, of barriers to access. ... Also associated with such ideas is a recognition that *communication and dissemination are integral parts of the research process itself*’ (emphasis added) (RIN 2012: 53). In short, research – as a concept within contemporary academia – is necessarily a public-facing activity, and the dissemination of research is a vital part of that activity.

That said, there is a cogent argument that the research exception does *not* enable the *dissemination* of research, but is instead largely confined to facilitating *access* to material for research purposes. The PA *Guidelines* suggest as much in offering that: ‘As a general rule, [this] exception is limited to *personal copying*’ (emphasis added) (PA 2008: 2). The root of this argument lies in s.29(3)(b): that copying is not fair if it results in copies ‘of substantially the same material being provided to more than one person at substantially the same time for substantially the same purpose’. On this provision, Burrell and Coleman write: ‘It seems that this was intended to ensure that the research and private study exception could not be used to justify classroom copying, but its effect is to prevent entirely any reliance on the research exception to justify the inclusion of a substantial part of an earlier work in a published research paper’ (Burrell and Coleman 2005: 117–18). The point is well taken, but I would offer a technologically-directed rejoinder.

Consider the difference between research that is published in print and born-digital form. If the article that you are currently reading had been published in a traditional academic journal, physical copies of which were sent to as many research libraries as subscribe to the journal then, applied literally, s.29(3)(b) is likely to preclude the lawful inclusion of copyright-protected material within this article based on s.29(1). But, because this work has been published in *The Comics Grid*, this article has only been made available to the public online. From a technical

perspective, the article is stored in PDF and XML versions on the Ubiquity Press server (these files will also be automatically archived with CLOCKSS). Now: does that mean that copies of this article 'are being provided to more than one person at substantially the same time'? Much would depend on what one understands by the phrase: 'at substantially the same time'. Are two people likely to access, or download, this article simultaneously?, or even nearly simultaneously?

One of the great advantages to communicating work online is that it facilitates *asynchronous engagement* with the work from a place and at a time individually determined by the reader. The flip side to this technological reality is that scholars, who are minded to do so, might be able to square Burrell and Coleman's circle by making informed choices about how and where they publish their research. That is: publishing in non-commercial, born digital journals such as *The Comics Grid* – rather than more traditional, for profit, subscription-based print journals – might afford academics greater scope to rely upon s.29 to reproduce copyright-protected material without the need for permission from the owner(s). Put simply: it may be that there is wriggle-room for reliance upon s.29 when disseminating one's research, depending upon the *technique of dissemination*.

But, as with my commentary on insubstantial copying, I do not want to labour the argument concerning the capaciousness of the research exception, and for two reasons: first, within the context of our current legal framework, there is a more obvious strategy that can be relied upon: fair dealing for the purpose of criticism and review; and second, as we shall see, the government are currently planning to introduce a new exception permitting quotation for any reason.

2.3.3. ... Or, for the purpose of criticism and review (s.30(1))
Section 30(1) permits fair dealing for the purposes of criticism and review, and sets out as follows: 'Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.' But what constitutes 'criticism and review'?

Consider the PA *Guidelines*: that fair dealing with a work is permissible provided there is 'a significant element of actual criticism and review of the work being copied (i.e. substantial comment, as opposed to mere reproduction), although this is sometimes interpreted liberally' (PA 2008: 2). Unfortunately, the PA's suggestion that the criticism in question needs to be directed *at the work being copied* is out of step with both the literal wording of the CDPA and with existing copyright jurisprudence; in short, it is likely to mislead. The legislation is unambiguous that criticism can be concerned with 'the work', 'another work', or 'a performance of a work'. Moreover, the courts have established that the scope of the exception is not confined to a critique or review of the style or merit of a work or performance *per se*, but can extend to the ideas, doctrine, or philosophy underpinning the work

(*Hubbard v Vosper* 1972), as well as to its social or moral implications (*Pro Sieben Media v Carlton* 1999). The comments of Lord Justice Robert Walker LJ provide a useful touchstone: that "criticism or review" [is an expression] of wide and indefinite scope'; that '[a]ny attempt to plot [its] precise boundaries is doomed to failure'; and that it is an expression 'which should be interpreted liberally' (*Pro Sieben Media v Carlton* 1999: 620). Without doubt, s.30(1) offers the academic working in the field of comics scholarship – as well as academic publishers – much greater scope for reproducing copyright-protected work than the PA *Guidelines* appear to suggest.

Consider, for example, the various images that I have included within this article. I have offered no criticism or review of the works from which these images have been taken. So: upon what basis do I reproduce them here? I could offer justifications that rely upon all three strategies discussed thus far: insubstantial copying; fair dealing for the purposes of non-commercial research; and, fair dealing for criticism or review. The latter, I have suggested, provides me with my most robust defence, but what is 'the work' that I am critiquing or reviewing? Dear Reader, I have a number of 'works' in mind, including (but not limited to): *The Comics Grid*; Taylor & Francis's FAQs document concerning the use of third-party material in academic articles; the Publishers Association *Permissions Guidelines*; and the *Copyright Designs and Patents Act* (the Act is, in itself, a copyright-protected work). Without hesitation, I would defend my reproduction of the copyright material reproduced within this article as lawful, and without the need for securing permission from the relevant copyright owners concerned.

Only in relation to one illustration did I bother to seek permission from (what I took to be) the copyright owner: the two panels from *Crisis* Issue 31 [Fig. 1]. Now, it is important to be clear that I did not seek permission because I considered it necessary. There is nothing about this illustration – when compared with the rest of the copyright-protected material that I have reproduced in this article – that marks it out as warranting special attention or consideration (at least, not from a rights-clearance perspective). Rather, my motivation was far more self-regarding and mundane. Dear Reader, the young man in those panels is none other than myself.¹³ That said, my experience in trying to clear rights in that particular image, is one that will no doubt be familiar to many academics that write about visual culture.

On 6 May 2013 I wrote to the Permissions Department at Egmont UK Ltd as follows: 'To whom it may concern / I'm an academic currently writing an article for publication in a scholarly journal concerned with comics and graphic novels. I'm hoping to reproduce two panels from a short 5-page story first published in 1989 in *Crisis* #31 (title: 'Her Parents'). The story was one of the first pieces ever published by Mark Millar (subsequently of 'Kick-Ass' fame). / I understand that Fleetway's portfolio (including *Crisis*) was purchased by Egmont UK in 1991, and that you still hold the rights to the *Crisis* comic (1989–1991). Is that correct? If so, could I have permission to reproduce the two panels concerned (that is: the

two panels in the bottom left hand corner of the third page of the story). / If not, could you let me know who does hold the copyright in that particular story from that particular issue of *Crisis*? Does the copyright in the work lie with Millar and John McCrae (the artist)? / I look forward to hearing from you soon.' On 20 May I received the following short response from the Brand Manager at Egmont Publishing Group's London Office: 'Many thanks for your query about using crisis artwork. I am afraid that we cannot authorise this use'. Because of the ambiguous nature of the response, I replied seeking clarification about the reason for Egmont's decision: '[I]s that because you don't hold the rights?, or because you do hold the rights, but you're not prepared to license the use of the image as requested?' Egmont's Brand Manager responded promptly and courteously, but in less than helpful terms: 'I'm afraid the situation is complex and I can't give more details'.

3. Current proposals for reform: An exception for quotation

Since the publication of the *Gowers Review* in 2006, the UK government has been considering, and consulting upon, various proposed reforms to the copyright regime, including reform of the copyright exceptions. As mentioned earlier, one of those proposed reforms concerns the introduction of a new exception permitting quotation for any reason.¹⁴ Part of the rationale for this new exception relates to the disparity between the scope of s.30(1) and its concomitant provision in the 2001 Directive. Article 5(3)(d) of the Directive states that Member States can provide for an exception relating to the use of quotation 'for purposes *such as* criticism and review' (emphasis added); s.30(1), however, currently limits use 'for the purpose of criticism and review' (emphasis added). As the Intellectual Property Office set out in its Impact Assessment on the proposed quotation exception: '[w]idening and thereby simplifying our current exception to cover any fair dealing with a quotation or extract would ... support free expression and debate. It would also align UK law with European and international norms' (IPO 2012: 3).

Moreover, it is clearly anticipated that one of the obvious communities to benefit from the new quotation exception will be the academic and research community. The IPO identify academics and scholars as one of the 'main affected groups' (along with copyright owners and consumers) to be considered when conducting a cost/benefit analysis of the proposal, and continue that '[e]xtracts may be useful in formal works, such as academic and scholarly texts, historical accounts, biographies and documentaries ... to help illustrate arguments and engage in comment and debate'. And when critiquing the scope of the existing provision, academic use is the IPO's touchstone: '[Section 30(1)] does not, however, permit the use of quotations in other contexts similar to criticism and review, which many people would nevertheless consider fair. So a short quotation in an academic work, or the use of a few bars of music in a book about the history of pop music would infringe copyright is not used in a critical context' (IPO 2012: 2–4).¹⁵

These perspectives, on the part of the IPO, are to be welcomed. Again: the government-funded UK Research Councils make clear that research should be relevant to society and wider societal concerns; it should engage the public and empower people; it should have impact (RCUK 2013). It is right that the copyright regime should enable, not inhibit, those aspirations. Government should take advantage of the latitude afforded under the 2001 Directive, to ensure that both s.29 and the new quotation exception facilitate research endeavour, including the dissemination of that research, to the fullest possible extent, but without unduly compromising the economic interests of copyright owners.

Indeed, in this context, the IPO strike the right note in emphasising that the quotation of works should be permitted 'only to the extent necessary, and *without competing with sales of the original work*' (emphasis added) (IPO 2012: 1). And again: '[a]s this exception will be limited to "fair dealing" and extracts will be limited to the extent necessary to serve their purpose, works using extracts *will not substitute for, or complete with, originals*' (emphasis added) (IPO 2012: 2). This focus on the likely commercial competition between the two works in question accords with the first of the so-called 'Laddie factors' and underscores the extent to which quotation – within the context of academic scholarship and publishing – should generally be unburdened from the various costs (financial, administrative, and otherwise) associated with copyright clearance. Would anyone sensibly claim that the copyright-protected material that I have reproduced within this article, without express permission, commercially competes with, or acts as a substitute for, any of the underlying works? Surely not; to do so would be utterly absurd. In fact, the reverse is true: the material that I have reproduced within this article has been chosen because of my great admiration for the authors and artists concerned. It is because I enjoy and respect their work so much, that I include it here: I am interested in championing this work, and in bringing it to the attention of new audiences.

To be sure, a less nimble and less enlightened copyright regime – one that was less minded to enable freedom of expression – might legitimately require that users seek permission for all such quotations, and thus secure a potential revenue stream for copyright owners. But copyright has never been concerned solely with securing any and every potential revenue stream for copyright owners; nor should it. The type of use and quotation that we have discussed and envisaged within this article is not such use as should require permission or payment. Put another way: these types of use fall outwith what might reasonably be regarded as the normal exploitation of copyright protected work; neither do they unreasonably prejudice the legitimate interests of the authors concerned.¹⁶

4. Conclusion

Will these proposed reforms make a difference? Will the new quotation exception make it easier for academics writing about comics – or indeed any academic working in the digital humanities – to reproduce copyright-protected work within their published research without needing to

clear rights in that work? Probably not: at least not in any meaningful way. Where they might make a difference is in relation to researchers who disseminate their work through websites and blogs, as well as other types of grey literature such as responses to government consultations or independent research reports. Rarely is the content of this type of material subject to editorial or other third-party intervention and as such researchers can choose to benefit from an exception that enables greater use of copyright-protected content without the need for formal permission.

But the mainstay of academic publication lies in books, book chapters, and journal articles, with journal publication firmly established as the predominant format across all disciplines, including the arts and humanities (a dominance that also appears to be increasing) (RIN 2009: 13–27). For as long as these types of output dominate the research landscape, academic publishers will remain the principal gatekeepers to the dissemination of scholarly research. And for as long as they do, any meaningful opportunity for researchers to benefit from the scope of these new exceptions is likely to be marginal, if not entirely bargained away as part of the publication process. We know that the Publishers Association interprets the existing exceptions far more narrowly than it needs to in the advice it gives its constituent members on copyright permissions. We also know that, in any event, academic publishers typically manage the business of copyright clearance by making their contributing authors responsible for securing permissions (even when the use of the material is covered by an exception). The imperatives underpinning those behaviours – maximising profit and minimising the risk (or fear) of copyright litigation – are entirely cogent, and they are unlikely to diminish in the mind of the publisher anytime soon. In short, it will make no difference to an academic that the copyright regime enables quotation from a work for purposes such as criticism and review, if the publisher chooses not to avail of that exception. Rights will still have to be cleared; and fees might have to be paid.

And, of course, it is reasonable to ask: why shouldn't academic publishers seek to maximise profits and minimise their risks? The reality is that academic publishing is a global success story, one that should be celebrated and supported. In 2007, the estimated annual revenue generated by (English-language) scientific and scholarly journal publication was just under \$8bn (or just over £4bn), the bulk of which revenue (68–75%) was generated through academic library subscriptions (Ware and Mabe 2009: 16). Moreover, this is an industry that has sustained year on year growth throughout the current economic crisis (Ware and Mabe 2012: 22). By 2011, for example, the annual revenue generated by journal publishing had risen to \$9.4bn (Ware and Mabe 2012: 19). (To contextualise that figure: in the same year the global revenue generated by the sale of recorded music (physical formats only) was just \$10.4bn (IFPI 2012).)

To be sure, the nature of research communication is changing, but academic publishers will continue to perform an integral role in the future of scholarly endeavour

and enterprise for many years to come. Indeed, it is important that they do so. They certify and review research, copy-edit, type-set and proof it for publication; they advertise, market and distribute the journals in which the research is published, develop new tools and platforms for engaging with that research, and archive and preserve it for the longer term (IASTM 2008). They add value in making our work easier to discover and navigate through citation linking and the allocation of persistent identifiers (digital object identifiers, or DOIs), coding for web dissemination, and other semantic publishing techniques (IASTM 2008; RIN 2012: 24–26). *How much value* academic publishers actually add is a question for debate, but certainly they do add value.

And yet, we should never lose sight of the fact that the real value in academic publishing lies in the intellectual capital and effort that researchers bring to the table. The figures quoted above represent only a partial snapshot of the economics of publishing scholarly articles. They do not account for the costs incurred by researchers who facilitate the peer review process (and largely without any remuneration): in 2007, that was estimated at £1.9bn; neither do they account for the costs incurred by funders and researchers in producing original research warranting publication: that was estimated at £115.8bn (RIN 2008: 31–33). Put another way, the subsidy that academic and scholarly publishers enjoyed in 2007 was £117.7bn of research investment in producing and peer reviewing scholarly articles for publication. Without the input of researchers and the academic community, academic publishing – as a business – is simply not viable. With that in mind, is it too much to ask that academic publishers adopt editorial policies and practices that enable their authors to take full advantage of the scope which the UK copyright regime allows for the lawful reproduction of copyright-protected material, and without incurring the frustration and cost of securing unnecessary copyright permissions? I would suggest not.

Publisher's note

An earlier version of this article was peer-reviewed and published as part of the CREATE Working Paper series (www.create.ac.uk), illustrated by Jason Mathis (Deazley and Mathis 2013). The usual conditions apply.

Notes

- ¹ 'Information for Contributors: Copyright/Permissions'. See: journals.berghahnbooks.com/eca/index.php?pg=notes (accessed: 19 April 2014). A declaration of a similar nature is set out on the 'Journal Contributors' Page' of the publisher's general website: 'When your article is accepted for publication, you must clear any required reproduction rights for any figures, photos, or text belonging to a third party, including any content found on the internet unless you can provide proof that no explicit permission is needed ... Your journal's Editor will require written correspondence attesting to the granting of permission. Should a fee be required, please first check that the quality of the

materials you would receive is acceptable to the journal. Please also note that contributors are responsible for clearing any fees related to the reproduction of any copyrighted materials' (journals.berghahnbooks.com/index.php?pg=authors (accessed: 19 April 2014)). For another example, see also *Studies in Comics*, published by Intellectual Books; the journal's 'Notes for Contributors 2010' sets out that: 'Copyright clearance is the responsibility of the contributor and should be indicated by the contributor'; see: www.intellectbooks.co.uk/MediaManager/File/STIC%20Notes%20for%20Contributors.pdf (accessed: 19 April 2014).

² See: <http://journalauthors.tandf.co.uk/copyright/usingThirdPartyMaterial.asp> (accessed: 19 April 2014).

³ For further details, see: www.publishers.org.uk (accessed: 19 April 2014).

⁴ See: www.copyrightinfringementportal.com/ (accessed: 19 April 2014).

⁵ Taylor & Francis, *Using third-party material in your article: Frequently asked questions*, journalauthors.tandf.co.uk/permissions/usingThirdPartyMaterialFAQs.asp (accessed: 19 April 2014). See also the stock responses to the questions: (i) Do I need permission even if I have redrawn figures? (ii) Do I need permission to reproduce the cover image of a book as part of a book review? (iii) Do I need permission if I use a facebook screenshot? (iv) Do I need permission to use an image from Flickr? (v) Do I need permission to use ClipArt? (vi) Do I need separate permission for an image that will appear on a journal cover? Other questions prompt a response that directs the potential contributor to other third-party guidelines: (i) Do I need permission to use an image from Google Earth? (ii) Do I need permission to use an image from Yahoo? (iii) Do I need permission to use a crown copyright image? (iv) May I describe and illustrate a patent in my article?

⁶ The FAQs response is as follows: 'Films stills, film clips, and extracts of video should be used specifically within the context of the article for criticism or review. Each clip should be no longer than is necessary to illustrate the point made in the text. You should always provide full credits for the source of every image or clip'. *Ibid.*

⁷ The FAQs response is as follows: 'In most cases, if the image you are using is specifically within the context of the article for criticism or review you should not need to get permission from the artist and the owner. However, some artwork falls under stringent copyright management. See www.dacs.org.uk/ for further help'. *Ibid.*

⁸ For a discussion of the concept of 'the work' within copyright discourse, see Sherman 2011: 99–121.

⁹ See also HMSO 2012: 14 (in which the government lists the same three factors as of relevance when determining whether a particular dealing with a work is fair or not).

¹⁰ For the non-lawyer: *obiter dictum* refers to a remark or comment made by a judge which, although included in the main body of the court's opinion, does not constitute part of *the reason for the decision of the court*

(what is referred to as the *ratio decidendi*). As such, comments that are *obiter* are not binding in any way upon the decisions of future courts, although they can be highly persuasive.

¹¹ That is: copying for private study is *personal* to the student, the academic, the individual seeking to acquire knowledge. Note, however, that the CDPA further defines 'private study' to preclude 'any study which is directly or indirectly for a commercial purpose' (s.178).

¹² As Burrell and Coleman put it: if the research exception does not extend to copying when a researcher's results are presented in an essay, a thesis, a published paper or a book, then 'the requirement of sufficient acknowledgement is anomalous' (Burrell and Coleman 2005: 117–18).

¹³ For those interested in how I came to feature in Crisis #31, the explanation is simple enough. Between the ages of 16 and 22 I worked in Northern Ireland's first comic shop – Dark Horizons – which, at that time was part-owned by John McCrea. When John was commissioned to illustrate "Her Parents" he asked if he could draw me into the story (apparently the protagonist in Millar's story reminded him of me). Photographs were taken; the rest is history. (And yes, those are my actual clothes. I was a fan of a nice cardigan even at the tender age of 17.)

¹⁴ The proposed new exception for quotation is set out in the draft *Copyright and Rights in Performances (Quotation and Parody) Regulations* 2014. At present the proposed new exception stipulates that copyright in a work is not infringed 'by the use of a quotation from the work (whether for criticism or review or otherwise) provided that – (a) the work has been made available to the public, (b) the use of the quotation is fair dealing with the work, (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)' (IPO 2014).

¹⁵ See also the commentary in HMSO 2012: 28 ('Uses of quotations which might be considered to be fair but may not currently be considered to fall within the criticism and review defence could include references and citations *in research papers*, the use of titles to identify sources in a bibliography, and the use of titles and short extracts to identify hyperlinks in internet blogs and tweets' (emphasis added)).

¹⁶ The Berne Convention (which originally dates to 1886) is an international agreement that requires the signatories to the Convention to recognise and confer copyright protection on the literary and artistic works of authors from other signatory countries. In this way the Convention enables the operation of the international copyright regime. In addition, the Convention sets out certain minimum criteria that signatory countries must ascribe to in their national copyright regimes. Article 9(2) of the Convention provides that '[i]t shall be a matter for legislation in the countries

of [the Berne Union] to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

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